Supreme Court, U.S.
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No. 01-1439

IN THE
# Supreme Court of the United States

LARRY SABO,

*Petitioner,*

*v.*

CITY OF OWENSBORO, KENTUCKY, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

## BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF OWENSBORO, *et al.*

PATRICK D. PACE
KAMUF, YEWELL & PACE
221 West Second Street
Owensboro, KY 42303
(270) 685-3901

DAVID C. FOWLER
*City Attorney for*
*City of Owensboro*
P.O. Box 10003
Owensboro, KY 42303-9003
(270) 687-8554

DAVE WHALIN
*Counsel of Record*
ROBERT T. WATSON
LANDRUM & SHOUSE LLP
220 West Main Street
Suite 1900
Louisville, KY 40202
(502) 589-7616

*Attorneys for Respondents*
*City of Owensboro, et al.*

173804

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Whether the trial court properly granted, and the Kentucky Court of Appeals properly affirmed, the finding of the Daviess Circuit Court that Petitioner had no property interest in continued employment as a probationary employee which was protected under the Fourteenth Amendment of the United States Constitution.

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## STATUTORY PROVISIONS INVOLVED

**KRS 18A.111(1)** Probationary periods for classified service — Initial and promotional.

> (1) Except when appointed to a job classification with an initial probationary period in excess of six (6) months, and except as provided in KRS 18A.005, an employee shall serve a six (6) months probationary period when he is initially appointed to the classified service. An employee may be separated from his position, reduced in class or rank, or replaced on the eligible list during this initial probationary period and shall not have a right to appeal, except as provided by KRS 18A.095. If the employee is separated from his position, he shall be notified in writing at least ten (10) working days prior to separation. A copy of the notification shall be forwarded to the commissioner. The employee shall be placed on an eligible list but shall not be certified to the agency from which he was separated unless that agency so requests. Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service.

**KRS 90.350(9)**

> (9) The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for period of

> not more than twelve (12) months, after which probationary period regular appointments shall be given to all probationary employees who are deemed to be satisfactory by the respective appointing authority.

## COUNTERSTATEMENT OF THE CASE

Respondents do not accept "Petitioner's Statement of Facts." In the Complaint, Petitioner alleged that the Owensboro Board of Commissioners (the Board) wrongfully terminated him in violation of KRS 90.310, *et seq.*, when it released him from his probationary appointment as Director of Finance and Administration on September 17, 1998. In particular, Petitioner alleged that, pursuant to KRS 90.350(9), he attained status as a regular, full-time civil service employee simply by serving in excess of twelve (12) months in the position of Director of Finance and Administration. Petitioner maintained that since he was a regular, full-time civil service employee at the time of his release, that his

> rights to substantive and procedural due process as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution and KRS 90.360 were violated when Petitioner was discharged without notice of the charges against him and without an opportunity for a due process hearing and other rights guaranteed to him under KRS 90.360.

In light of Petitioner's allegations, the sole dispositive issue before the Trial Court and the Kentucky Court of Appeals was purely a question of law: Under the plain

language of KRS 90.350(9), was the Petitioner a probationary at-will employee unless and until he was "deemed satisfactory" by the Board, or did the Petitioner obtain status as a regular civil service employee simply by the passage of time?

Both the Petitioner and the Respondents moved for summary judgment. The Trial Court agreed with the parties that the dispositive issue of law involved Petitioner's employment status at the time of his release on September 17, 1998. The Trial Court found that the plain language of KRS 90.350(9), and the legislative intent of the statute, supports the conclusion that an affirmative determination by the appointing authority (the Board) that the employee is "deemed to be satisfactory" is required before an employee can obtain regular civil service status. Since it is undisputed that the Board considered Petitioner's regular appointment on September 17, 1998 and voted to release him from his probationary appointment, the Board, as the appointing authority, did not deem Petitioner to be satisfactory as required by KRS 90.350(9). Finding that Petitioner was an at-will employee at the time of his release, the Trial Court and Kentucky Court of Appeals determined that the Board, as the employer, had "unfettered discretion in deciding whether to retain a discretionary employee." The Trial Court and Kentucky Court of Appeals thus concluded that Petitioner failed to state a claim for wrongful discharge and a claim for constitutional violations as a matter of law.

Petitioner, has provided this Court with "facts" that culminated in Petitioner's release. As determined by the Trial Court and the Kentucky Court of Appeals, some of the undisputed facts explain why the Board's decision to release Petitioner was delayed. While many of the "facts" alleged

by the Petitioner are disputed by the Respondents, the material facts relevant to the statutory construction of KRS 90.350(9) are not in dispute. The factual inquiry of whether Petitioner was actually doing a ***"good job"*** during the initial twelve (12) months of his probationary appointment or after the twelve (12) months has no bearing on the legal issue of his employment status at the time the Board voted to release Petitioner on September 17, 1998. Indeed, whether Petitioner was doing a good or satisfactory job is irrelevant for purposes of determining Petitioner's employment status under the statute at the time of his release.

## REASONS FOR DENYING THE WRIT

The questions allegedly presented for review by the Petitioner are whether he was deprived of a property interest in continued employment in violation of the due process clause of the Fourteenth Amendment when he was terminated following the expiration of his twelve month statutory probationary period and whether Petitioner had a right to due process under the Fourteenth Amendment when he was dismissed after approximately twenty months of employment. Petitioner goes on to state in his Statement of the Case that neither the Daviess Circuit Court nor the Kentucky Court of Appeals ruled directly on such arguments and thus that a writ is appropriate. Respondents note, as acknowledged by Petitioner, that both such arguments were presented to the Daviess Circuit Court and the Kentucky Court of Appeals, each of which clearly had an opportunity to and did review all authority and arguments asserted in support of such contentions. Clearly, such Courts did not find Petitioner's contentions persuasive and/or relevant for the entry of summary judgment and subsequent affirmation on appeal. Petitioner presents no new or novel argument in his Petition

for Writ to this Court. The Daviess Circuit Court and the Kentucky Court of Appeals' rulings were proper in all respects and Respondent respectfully urges this honorable Court to deny the Petition for Writ of Certiorari.

Petitioner asserts that since he was fired following expiration of a twelve month statutory probationary period he became a regular civil service employee who could not be dismissed without cause and/or without an opportunity for a hearing. Such assertions are simply incorrect and totally ignore existing Kentucky statutory and case authority.

The provisions of KRS 90.350(9) are not inconsistent. Such statute clearly provides that one will be promoted to regular civil service status if the probationary employee is determined to be satisfactory. This is harmonious with KRS 18A.111(1) which provides that a probationary employee acquires classified civil service status, unless the appointing authority notifies the employee prior to the end of the probationary period that he is separated from employment. Such rationale is borne out by the legislative history of KRS 18A.111(1). Subsection (9) of KRS 18.210, the predecessor of that statute, originally provided for a affirmative action by the appointing authority for the appointment of state merit employees to regular status. The statute was amended by chapter 86, § 5 of the 1976 acts as follows:

> (8) For a period of probation not to exceed (1) year before appointment or promotion may be complete, and during which period a probationer may be discharged or reduced in class or rank, or placed on the ineligible list. Unless the appointing authority notifies the employee prior to the end

> of the probationary period that the employee's services are not satisfactory, the employee shall have status in the classified service. A notice shall be in writing as provided by personnel rules; ~~The appointing authority shall, within thirty (30) days prior to the expiration of an employee's probationary period, notify the commissioner in writing whether the employee is recommended for permanent status. Only if the appointing authority certifies to the satisfactory nature of the probationary employee's services, shall permanent status be conferred;~~ [NOTE: The legislature renumbered §§ (9) as §§ (8) in the 1976 Amendment.]

If the legislature had intended that a probationary civil service employee would automatically acquire regular civil service status by the failure of the appointing authority to act, the legislature would have amended KRS 90.350(9) in the same fashion. It did not. Both the Daviess Circuit Court and the Court of Appeals appropriately construed the statute in question.

The Petitioner's claims of constitutional deprivations are equally unfounded. As a probationary employee, the Petitioner was dischargeable at will. The board had "unfettered discretion in deciding whether to retain a probationary employee." *Louisville Professional Firefighters Association v. City of Louisville, Kentucky, Ky.*, 508 S.W.2d 42 (1974) at 43. Petitioner, as an at-will probationary employee, had no constitutionally protected interest in his probationary position. *Hooks v. Smith*, Ky. App., 781 S.W.2d 522 (1989). As recognized by Petitioner, this Court has reached similar conclusions. *Gilbert v. Homar*, 520 U.S. 924 (1997); *Connecticut Board of Pardons v. Durnschat*, 452 U.S. 458 at 465 (1981); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985); and *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Despite this, Petitioner asserts that this Court should review its decisions in the foregoing cases regarding one's proprietary interest in continued employment as protected by the due process clause of the Fourteenth Amendment while serving a probationary period. In support of such petition, Petitioner relies upon earlier decisions of this Court, some of which even pre-date the above-referenced authority, regarding convicted parolees' entitlements to due process prior to revocation of parole. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Such cases are clearly distinguishable in that they involve an individual's personal freedom, clearly protected under the Fourteenth Amendment, and are in no way analogous to this case and one's expectation of continued employment while in a probationary position.

Petitioner also asserts that the Court has shown an inclination to hold governmental agencies more accountable for their actions. While this might be true, such in no way supports Petitioner's Writ for Certiorari in that it is not a question of whether Respondent is immune from a civil rights action under 42 U.S.C. § 1983, as clearly they are not, but rather whether Petitioner, as a probationary employee, had a property interest in continued employment with the City of Owensboro which was protected under the United States Constitution.

Petitioner has offered absolutely no authority in support of his Petition and to grant the same would result in a contorted interpretation of existing statutory and pertinent case law. The Petition for Writ of Certiorari is entirely without merit and should be denied.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that this honorable Court deny the Petition.

Respectfully submitted,

DAVE WHALIN
*Counsel of Record*
ROBERT T. WATSON
LANDRUM & SHOUSE LLP
220 West Main Street
Suite 1900
Louisville, KY 40202
(502) 589-7616

PATRICK D. PACE
KAMUF, YEWELL & PACE
221 West Second Street
Owensboro, KY 42303
(270) 685-3901

DAVID C. FOWLER
*City Attorney for*
*City of Owensboro*
P.O. Box 10003
Owensboro, KY 42303-9003
(270) 687-8554

*Attorneys for Respondents*
*City of Owensboro, et al.*